Holiday Displays
PAGE 3

The Advisor

Region Legal Service Office Southeast

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BRIEFING

Introduction from the Director of Command Services

BY **LCDR LINDSAY PEPI**
JACKSONVILLE, FL

Hello, my name is LCDR Lindsay Pepi and I would like to take this opportunity to introduce myself as the new Director of Command Services for Region Legal Service Office Southeast. As we navigate through a new year of diverse legal topics, I look forward to working with leadership from installations, tenant commands, operational commands, and others in the Southeast region. Important issues that should be on your radar include: transgender Sailors, carrying privately owned firearms on DoD property, and significant changes to the Manual for Courts-Martial within the 2017 National Defense Authorization Act, which has passed Congress and is with the President. These are just a few of the complex legal topics on the horizon. With that in mind, I encourage all of you to reach out to your local Staff Judge Advocate, Legal Assistance Attorney, or Trial Attorney if you have questions or need assistance. RLSO SE is here to help! I am looking forward to working with all of you.

Retirement Pay, Division in Divorce

BY **LT G. BLAIR KUPLIC**
MAYPORT, FL

Since Congress's enactment of the federal law known as the Uniformed Services Former Spouses Protection Act (USFSPA) in 1982, there has been much confusion among servicemembers and spouses alike surrounding the division of military retired pay in a divorce. Much of the confusion is centered on the application of what is commonly referred to as the "Ten Year" or the "10/10" rule. USFSPA did not create one standard rule for dividing military pay, but rather gave each state the right to

SEE **DIVORCE**, PAGE 9

Sitting Down to Take a Stand: Protesting and Political Activity in the Military

BY **LT CAITLIN HOWITT**
PENSACOLA, FL

While protesting in the military is not a new occurrence, election season and the recent string of highly publicized celebrity protests have put a spotlight on this area. The examples of Colin Kaepernick sitting down during the National Anthem, and Beyoncé's Black Panther homage at the Super Bowl half-time show have caused service members to question whether the same freedoms of expression enjoyed by civilians are permissible for military personnel. At least one service member in Pensacola emulated these celebrity protests by filming herself sitting during colors and subsequently posting her video to social media, garnering national media attention. Such instances reinforce the need for clear guidance on what behaviors are permissible for members of the military. While overall guidance on protests and political activities is contained in DoDI 1325.06, "Handling Dissident and Protest Activities Among Members of the Armed Forces" and DoDD 1344.10, "Political Activities by Members of the Armed Forces," these instructions do not specifically address all types of protest. Some rules are specific to the exact nature of the protest or manner of expression. At the heart of the Department of Defense policy is the idea that our rules and regulations should preserve the service member's right to free expression to the maximum extent possible, while maintaining good order and discipline, as well as protecting national security. While this general "balancing" framework is helpful, making a specific decision about how much and when the military can restrict service members' expression may be a more complex determination.

In general, the First Amendment protects the right to articulate opinions and ideas without fear of govern-

SEE **POLITICAL ACTIVITY**, PAGE 2

Political Activity

U.S. Navy Photo by SN Chad M. Trudeau

ment retaliation or censorship, including both verbal and non-verbal forms of expression. However, in the landmark case concerning freedom of speech in the military, Parker v. Levy, 417 US 733 (1967), the Supreme Court accepted the Government's argument that there should be a different, and at times more restrictive, standard of free expression for the military. Levy, an army doctor, made the following statements: "The United States is wrong in being involved in the Vietnam War," "Special Forces personnel are liars…and killers of women and children," and "I would refuse to go to Vietnam if ordered." He was found guilty at a General Court Martial for disobeying a lawful order and conduct unbecoming an officer and a gentleman. The Supreme Court upheld his conviction, stating that the military could have a different standard than its civilian counterpart, and could regulate speech *where such speech undermines the effectiveness of military leaders or presents a clear danger to loyalty, discipline, mission or morale*.

Other Supreme and lower court opinions have similarly held that the military can limit certain types of expression, for example, distributing extremist materials on base (Priest v. Secretary of the Navy, 21 CMA 564 (CMA 1972)), and disrespecting the flag (U.S. v. Wilson, 33 MJ 797 (AMCR 1991), where a guard detail blew his nose into the flag). In another important case, Ethredge v. Hail, 56 F.3d 1324 (11th Cir. 1995), the federal court upheld a limitation on a civilian military employee who violated a base order prohibiting, "Bumper stickers or other similar paraphernalia which embarrass or disparage the Commander in Chief…and have a negative impact on the good order and discipline," by displaying bumper stickers like, "To hell with Clinton and Russian aid." The court stated that the commander merely needed to demonstrate a "clear danger to military order and morale," and concluded, "We must give great deference to the judgment of these officials." The court, however, reemphasized that such restrictions must be viewpoint neutral – *i.e.*, they cannot allow one particular religious, political, or ideological viewpoint, but restrict opposing viewpoints. Furthermore, where speech or expression is limited by military regulations or instructions, there must be a "direct and palpable connection between speech and the military mission or military environment." United States v. Wilcox, 66 M.J. 442.

Some specific types of protest are guided or prohibited by regulation. These include use of contemptuous speech about the President, other public officials, or senior military personnel (see UCMJ Articles 88, 89 and 91), causing or participating in a riot or breach of the peace (see UCMJ Article 116), use of hate speech or speech that incites violence (see UCMJ Article 117), use of any speech or taking any action which gives assistance to the enemy (see UCMJ Article 104), speech that urges service members to desert (see 18 U.S.C. 1381 and UCMJ Article 82), and speech that advocates overthrow of the government (see 18 U.S.C. 2385). However, commanders should be mindful when enforcing these regulations that they are directed at maintaining good order and discipline, and protecting national security interests, not simply at limiting free expression.

Regarding political activities, the policy stated in DoDD 1344.10 is that military members should give full time and attention to performance of military duties, avoid outside activities that are prejudicial to good order and discipline or service discrediting, and refrain from participating in political activity while in uniform. Furthermore, the Hatch Act (5 U.S.C. §§ 7321-7326, 5 C.F.R. § 733-734) limits certain political activity by executive branch civilian employees. DoDI 1325.06 also discusses prohibited associations, specifically barring service members from actively participating in supremacist or extremist groups. Additionally, commanders can prohibit off-base assembly where service members are on duty, in a foreign country, illegally assembling (e.g. with no permit), or where violence is likely (see DoDI 1325.06, Enclosure 3). While some specific instances of political speech and activity are addressed in instructions and laws, others are more uncertain and will depend upon the reasoned and prudent judgment of the military commander.

Returning to the example from the beginning of this article, the sailor, who was in civilian attire, filmed herself sitting during colors, in violation of OPNAVINST 1710.7A (referring to U.S. Navy Regulation 1205, and as clarified by NAVADMIN 098/09), which states, "[D]uring the playing of the national anthem…Sailors not in uniform will face the flag, stand at attention, and place the right hand over the heart." Per these instructions and regulations a sailor may be

See Political Activity, Page 3

Political Activity

punished for refusing to stand during the playing of the national anthem whether in or out of uniform. However, due to the instruction's confusing language, where there is concern about Kaepernick-inspired protests, the command may want to publish their own clarifying instruction or order, keeping in mind that it should be tailored to protect free expression to the maximum extent possible. For any case of protest which does not clearly fall under an instruction or punitive article, it is always a good idea to consult your Staff Judge Advocate or local Command Services Office.

While the rules concerning protest and political activity in the military can sometimes be vague, and are often at the discretion of the military commander, here are some "Do's" and Don'ts" to provide individual and command guidance:

DO:

- Exercise your right to vote.
- Wear civilian attire when attending rallies or peaceful protests.
- Stay safe and remain vigilant about local threats. Follow the instructions of local law enforcement if the situation deteriorates.
- Remember that your off-duty conduct is subject to the Uniform Code of Military Justice.

DO WITH CAUTION:

- Express personal opinions outside of the workplace.
- Join a political club (but beware of extremist or hate groups).
- Sign petitions (but beware of extremist or hate groups).
- Attend meetings or rallies as a spectator (but beware of extremist or hate groups).
- Give money to political organizations in your personal capacity.
- Write personal letters to the editor (but do not imply military endorsement).

DO NOT:

- Wear a uniform at a protest or political event.
- Use military affiliation when expressing partisan viewpoints.
- Campaign for anyone.
- Campaign for or hold public office (note special rules for reservists).
- Post posters in Federal buildings.
- Speak or make appearances for a candidate (even privately).
- Fundraise for a candidate, party, or partisan cause.
- Distribute partisan political literature.

Government-Sponsored Holiday Displays and Celebrations

By LN1 James Hills
Corpus Christi, TX

Americans learn about the doctrine of separation of church and state as early as middle school. Although the Free Exercise Clause of the First Amendment serves to protect private speech, including speech that endorses religion, the Establishment Clause prohibits government actions that endorse religion. So, government-sponsored holiday displays or celebrations that specifically endorse particular religion violate the Establishment Clause of the First Amendment.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Supreme Court found total separation of church and state to be impossible. So, the courts employ tests to determine if government actions violate First Amendment freedoms. The Supreme Court formulated the legal test to analyze religious implications in *Lemon v. Kutzman*, 403 U.S. 602 (1977). For holiday displays to be permissible under the "Lemon test," the display must (1) have a secular purpose, (2) have as its primary effect neither the advancement nor the inhibition of religion, and (3) not create excessive government entanglement with religion. Actions, such as a government-sponsored holiday displays, that do not meet all three criteria may be unconstitutional under the Establishment Clause.

For example, in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), the Supreme Court rejected the argument that a county was allowed to display a crèche simply because Christmas was a national holiday. "The government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus" (*Id.* at 601).

The Court reached a different opinion regarding a second display that offered a more secular message instead of endorsing religion. Importantly, the Court's decision did not hinge upon whether the display included symbols from both Hanukah and Christmas, because if the display "celebrates both Christmas and Hanukah as religious holidays, then it violates the Establishment Clause" (*Id.* at 614). The display must have a secular purpose.

The government may be able to celebrate both Christmas and Hanukah as secular holidays. The question under the Establishment Clause is whether the combined display has the effect of endorsing several religions—or merely acknowledging that those religions are all part of the same winter-holiday season. "In these circumstances, then, the combination of the tree and menorah communicates not a simultaneous endorsement of both the Christian and Jewish faiths, but instead a secular celebration of Christmas coupled with an acknowledgment of *Chanukah* as a contemporaneous alternative tradition" (*Id*. at 617–18).

Remember that only a Staff Judge Advocate may provide legal advice to commands. The determination of which holiday displays are appropriate is nuanced and highly dependent upon attendant facts and circumstances. As always, please consult your local SJA.

U.S. Navy Photo by LT Ayana Pitterson

OTH after EAOS

BY LT KEVIN LOUGHMAN
MILLINGTON, TN

A member can agree to an Other than Honorable in an arms-length agreement, a Pre-trial Agreement (PTA), or Separation in Lieu of Trial by Court Martial (SILT), even if the member is past his EAOS and on legal hold at the time of the agreement.

What authorities permit the Navy to place Sailors on legal hold? In the Uniform Code of Military Justice (UCMJ), Congress grants military courts-martial personal jurisdiction over servicemembers. As a result, Congress implies that the Navy can involuntarily extend a member to prosecute violations of these criminal statutes. Absent the ability to extend Sailors, UCMJ-specific offenses would essentially have varying statutes of limitation based on the EAOS of the offender and those otherwise listed in the UCMJ. In MILPERSMAN 1160 -050, the Navy permits involuntary extensions for "apprehension, arrest, confinement, investigation, or filing of charges that may result in a trial by court-martial, and execution of any sentence thereof." Involuntary extensions are strictly limited to situations "with a view to trial" and cannot be used primarily for other purposes.

Can the Navy involuntarily extend a member past his EAOS to process the member for administrative separation (ADSEP)? *No*. Because of the degree of restriction involuntary extension has on the liberty of the member, they are only permitted in three situations. As noted in Section 2, above, the UCMJ permits involuntary extensions "with a view to trial." In 10 U.S.C. Ch. 31, Congress only provides for involuntary extensions of enlisted members during national emergencies or war. MILPERSMAN 1910-208 specifically prohibits involuntary extensions "for the sole purpose of administrative separation processing." If a member goes to a Court-Martial after his EAOS and does not receive a dishonorable or bad conduct discharge, he will immediately separate with an honorable discharge. MILPERSMAN 1910-208 provides that the member can voluntarily extend after his Court-Martial, opening the member up to the possibility of administrative processing and an OTH. This demonstrates that the key consideration for a board to occur after a member's EAOS is the member's consent to the board or remaining in the Navy.

While on legal hold, can a Convening Authority give an OTH as part of a SILT? *Yes*. Though Sailors cannot be involuntarily extended "for the sole purpose of administrative processing" (emphasis added), MILPERSMAN 1910-106 notes that administrative processing can be bargained-for consideration as part of a plea bargain in the military justice process. In this scenario, after preferral of charges, the government offers the member a lighter sentence than he would have at trial and, in return, agrees to grant the Navy the ability to award an OTH after his EAOS. In other words, a SILT is tantamount to a voluntary extension by the member and does not cause the same legal concerns that would arise from processing someone for ADSEP after placing a member on legal hold with a view to trial.

While on legal hold, can a Convening Authority give an OTH as part of a PTA? *It's possible*. An accused Sailor can agree to an administrative separation as a part of a PTA, even when that Sailor is on legal hold. This allows the convening authority to ensure the member is separated from the Naval Service, even in the event the Judge does not award a punitive discharge. The characterization of separation will ultimately be determined by the Separation Authority. However, in most cases this will be with an OTH. .

MANUAL FOR COURTS-MARTIAL (2016 ED.), FEDERAL REGISTER NOTICE

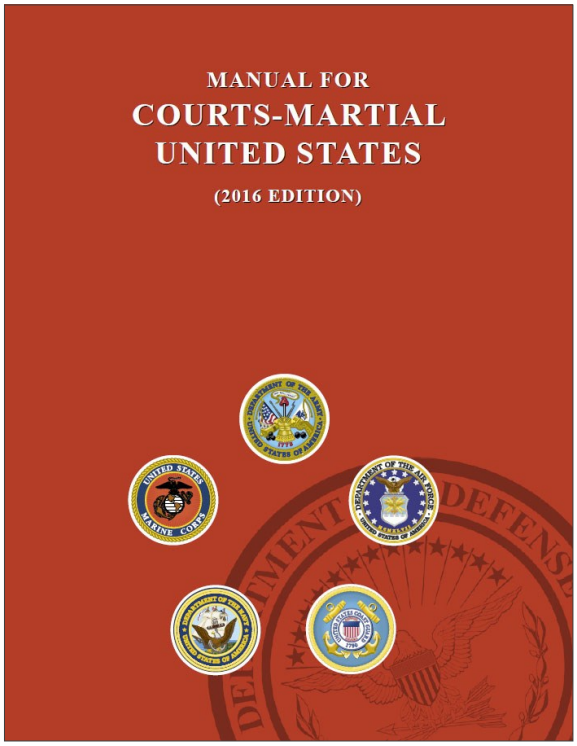
BY NAVY JAG CORPS (CODE 20)
WASHINGTON, DC

The President signed Executive Order (EO) 13740 on 16 September 2016 to implement numerous changes to the Manual for Courts-Martial (MCM). These changes have been incorporated into a 2016 edition of the Manual for Courts-Martial (MCM) available on the Joint Service Committee on Military Justice (JSC) website (http://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/). Additionally, the JSC will be releasing Supplementary Materials that amend a number of Discussion paragraphs and certain portions of the Analysis appendix. Both the EO and these Supplementary Materials will be posted on JSC's webpage.

Distribution of the hard-copy MCM will occur in the next couple of months; until then, this version should be used instead of the now out-of-date 2012 Manual for Courts-Martial. The MCM reflects changes made to the Uniform Code of Military Justice (UCMJ) by Congress over the past four years; many of which have been the subject of previous sidebars, as well as changes to the Rules for Courts-Martial, Military Rules of Evidence, Discussions, Appendices, and Supplementary Materials stemming from Executive Orders 13643, 13669, 13696, 13730, and 13740.

SEE MCM, PAGE 5

MCM (2016)



Major changes include:

- R.C.M. 307(c)(3) and Pt. IV, ¶60: Require that a specification alleging an Art. 134 violation expressly allege a terminal element.
- R.C.M. 701(e) and 703(a): Require defense counsel to request any interview with a victim of a sex-related offense through the victim's counsel, and to conduct interviews with certain persons present.
- Pt. IV, ¶¶43.c.(5)(b) and 44.b.(2)(d): Reflect the elimination of consensual sodomy as an Art. 125 offense.
- Pt. IV, ¶¶45, 45b, and 45c: provide elements, explanations, and sample specifications for Articles 120, 120b, and 120c, and implement the FY14 NDAA's enactment of the mandatory minimum sentence of dismissal or dishonorable discharge for rape and sexual assault and rape and sexual assault of a child.
- Pt. IV, ¶90: Establishes the offense of indecent conduct, which, unlike the earlier offense of indecent acts with another, does not require the presence of another person.

Effective date:

All changes to the MCM were effective as of 16 September 2016 with two exceptions. First, the changes will not make punishable any act done or omitted prior to 16 September. Second, any non-judicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action commenced prior to the signing of the EO shall not be invalidated by the new rules and, if still in progress, shall proceed as if the new rules had not yet come into effect.

Mental Health Evaluations
Emergent or Non-emergent?

By LT Medardo Martin
Mayport, FL

As a society and as a Navy, we have come a long way on the issue of mental health. While generations of the past might have looked at getting help for issues as a weakness and stigma, today it is just another part of maintaining mission readiness with good health. Occasionally you may have to make the decision of whether to refer someone for a Mental Health Evaluation (MHE). This is your guide.

Since 2013, MHEs have been guided by DOD Instruction 6490.04, Mental Health Evaluations of Members of the Military services. At the crux of DoD policy on mental health is the goal of ensuring that there is no stigma associated with service members seeking and receiving mental health services. Sailors should be no more ashamed or stigmatized for seeing a mental health therapist than a physical therapist.

There are two types of evaluations— non-emergent and emergent:

Non-Emergent. If you believe in good faith that a subordinate service member requires a mental health evaluation, commanders and supervisors may direct a non-emergent MHE. This directed MHE will have the same status as any other military order. It must be made in accordance with procedures laid out in the instruction. Specifically, the referral should be made in writing and should specifically advise the member that there is no stigma associated with obtaining mental health services, as well as providing the name of the mental health provider with contact information along with the date, time, and place of the scheduled MHE. Note that the obligation is on the commander to make the arrangements for the MHE. It is not enough to simply order a Sailor to report to the mental health clinic at your nearest Military Treatment Facility.

Emergent. Of course, sometimes we encounter crisis situations that require immediate action. The instruction provides that commanders and supervisors will refer service members for emergent MHE as soon as practicable when: (1) A service member, by actions or words, such as actual, attempted, or threatened violence, intends or is likely to cause serious injury to him or herself or others; (2) When the facts and circumstances indicate that the service member's intent to cause such injury is likely; and (3) When the commanding officer believes that the service member may be suffering from a severe mental disorder.

Notably, when directing an MHE, a CO or supervisor's primary concerns will be to: (1) protect the safety of the member and others; and (2) Communicate to the mental

See MHEs, Page 6

Caturday is fun!

Unless it happens on your installation

By LCDR Katie Worstell and LT Emily Daniels
Meridian, MS

The Chief of Naval Operations prohibits "[d]ogs, cats, and other privately-owned or stray animals" from running at large on military reservations. In short, federal installations cannot become animal sanctuaries. So, what is an Installation Commanding Officer to do?

Under the CNO's Feral Animal Policy, Navy commanders must not only "ensure the humane capture and removal of free roaming cats and dogs" but also "prevent feral cat and dog populations." How the Navy goes about this depends on whether or not the cats are located on the installation itself or on federal property that we have out-granted (i.e., leased or licensed) in some way (e.g., public private venture housing).

For Navy-controlled property, start with your installation Public Works Department. According to OPNAV Instruction 6250.4C, Naval Facilities Engineering Command is responsible for "[r]ecommending programs to remove feral cats and dogs from installations." Similarly, installation natural resources managers are required to have technical oversight of all animal damage programs, which will include addressing feral cats, dogs, and strays.

Pursuant to Secretary of the Navy Instruction 6401.1B, the base veterinarian is responsible for coordinating "the maintenance of a local regulation or directive that provides minimum standards for animal welfare and control, including … stray and wild animal control programs." Stray animals will also be considered DOD-owned for the first 3 working days following capture, after which they will be either adopted or euthanized in accordance with SECNAV policy.

The overarching principle of stray and feral animal management plans is to treat all animals humanely. As a result, there is a hierarchy of preferred courses of action. Note that the Feral Animal Policy now prohibits Trap/Neuter/Release (TNR) programs on installations.

Default COA for all animals: Establish a working relationship with local animal control and rescue agencies. Use the most humane traps possible to capture animals on base by trained base personnel; and then transport the animals off base for the partner agencies to evaluate animal health, look for a microchip, and to rehome or put up for adoption. If available, on base veterinary services may perform the health check and kennel animals pending adoption. When using traps, remember the goal is to be humane – check traps frequently to minimize the time that animals are confined. See Armed Forces Technical Guide 37 for more specific guidance.

Modification for severely sick: Extremely sick or wounded animals that cannot be adopted or rehomed may be euthanized. The CNO's Feral Animal Policy directs that "[e]very effort should be made, if practical, to find homes for adoptable feral cats and dogs," but as Armed Forces Technical Guide 37 states, "sometimes euthanizing a stray animal can be the most humane option."

Group of cats via ThinkStock

Emergency COA: In case of emergencies only, such as risk of severe disease like rabies or injury to personnel and pets, lethal force by trained personnel may be authorized by the installation commander. Lethal force should be used in a way that minimizes the duration of the animal's suffering. If circumstances permit, base personnel should be alerted of the activity to minimize panic.

Finally, for feral and stray animals located "[i]n Privatized Housing, pest control (including stray animals) is the responsibility of the Privatized Housing Owner in accordance with the governing lease agreements" and Armed Forces Technical Guide 37. The installation and PPV should work together to minimize conditions that invite strays to PPV and to distribute installation as well as housing policies regarding feral, stray, and domestic pets such as leash and veterinary requirements.

Mental Health Evaluations

health provider circumstances and observations that led to the referral prior to or during transport.

Different from a non-emergent MHE, the emergent MHE does NOT require: (1) a memo outlining the member's rights and reasons for the referral; and (2) a memo given to the mental health provider as soon as practicable. Verbal communications suffice.

In the event that your ervice member is admitted for inpatient psychiatric care following the referral, the mental health provider's decision will be reviewed by an independent psychiatric provider within 72 hours of admission. The patient will be entitled to have a JAG or civilian counsel present at the review.

As long as the process goes on, and as long as the member's condition allows, the member will have the right to speak with attorneys, chaplains, members of Congress, Inspectors General, and friends and family.

Finally, it should go without saying—MHEs should never serve as reprisal for protected communications with Congress or the IG. When in doubt, consult your nearest Staff Judge Advocate.

A GUIDE TO LAWFUL ORDERS

BY LTJG STERLING SPENCER
PENSACOLA, FL

"Tell the men to fire faster and not to give up the ship; fight her till she sinks."
-Captain James Lawrence

"Damn the torpedoes! Four bells. Captain Drayton, go ahead! Jouett, full speed."
-Admiral David Glasgow Farragut

What do these historic phrases have in common? They are a type of order. Lawful orders are fundamental to the operations of the U.S. Navy and essential to mission accomplishment. From day one, every Sailor promises to abide by lawful orders. Take a look at the oath of enlistment or oath of office. What you will see in the oath of enlistment is a pledge to obey the orders of the President of the United States and the orders of the officers appointed over them. Similarly, the oath of office promises to support and defend the Constitution of the United States and faithfully carry out the duties of the office for which they are about to enter. With such an elementary role in our Navy, one might think that the ins-and-outs of lawful orders are just as simple; however, that is not always the case. This article focuses on the elements of a lawful order, distinguishes between the two types of orders, and discusses a recent liberty order in a foreign country.

Article 92 of the Uniform Code of Military Justice outlines two types of lawful orders: general lawful orders and other lawful orders. General lawful orders or regulations are those properly published by the President or the Secretary of Defense, Homeland Security, or a military department, and those orders or regulations generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof which are issued by: (i) an officer having general court-martial jurisdiction; (ii) a general or flag officer in command; or (iii) a commander superior to the previous two items listed. Comparatively, other lawful orders are exactly that. They are all other remaining lawful orders. Both types of orders have differing elements to prove a violation. Notably, other lawful orders requires that the violator has actual knowledge of the issued order, whereas general orders do not require knowledge of the issuance.

GENERAL LAWFUL ORDERS *Violation of UCMJ, Article 92(1)*	OTHER LAWFUL ORDERS *Violation of UCMJ, Article 92(2)*
1. A certain lawful order was in effect; 2. Accused had a duty to obey it; and 3. Accused violated or failed to obey the order.	1. A member of the armed forces issued a certain lawful order; 2. Accused had knowledge of the order; 3. Accused had a duty to obey the order; and 4. Accused failed to obey the order.

The word "lawful" is presented before every use of the word "order" because all orders must be *lawful* to pass constitutional muster. The UCMJ presumes all orders to be lawful and outlines what constitutes a lawful order. General lawful orders are lawful unless they are contrary to the Constitution, the laws of the United States, lawful superior orders, or for some reason beyond the authority of the official issuing it. When an individual issues an order, it must relate to military duty and it must be specific. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. However, the dictates of a person's conscience, religion or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order.

Because multiple factors contribute to the determination of lawfulness, it is best to consult your Staff Judge Advocate before issuing a lawful order. For example, the lawfulness of an order often stems from an already existing order or regulation that permits the issuance of an order should certain triggering circumstances arise. This past summer, U.S. Forces Japan, issued a liberty order applicable to all U.S. military forces located at or operating in Japan. The liberty order specifically detailed the personnel it would apply to, the methods by which to follow the policy, and that it was a lawful general order.

Among various restrictions, the liberty order prohibited the off-installation public consumption of alcohol between certain hours for all military personnel regardless of grade. Although this order was issued to all U.S. forces in Japan, for the Navy specifically, multiple governing bodies of law—from the Navy Regulations to the JAGMAN—permit competent authorities to regulate leave and liberty policies in foreign countries when it is deemed essential for the protection of the foreign relations of the United States. The background section of the order explains that "acts of indiscipline or criminal behavior by U.S. military personnel adversely impacts national relations" and tarnishes the "image of the United States military" and affects our "military readiness." Additionally, the order underscored the importance of maintaining a positive impression with the citizens of Japan which was crucial to the sustainability of our alliance and long term presence in the host country.

Based on this example alone, it is easy to see the multitude of factors present when issuing a lawful order. So remember to follow the outline above and as always consult your local SJA.

NASA/NOAA GOES Project

Claims for Property Damage or Evacuation due to Hurricane Matthew

BY LT PAUL WAGONER AND LT MATTHEW HECK
JACKSONVILLE, FL

On Friday, 7 October 2016, Hurricane Matthew made landfall on the coast of eastern Florida, claiming 36 American lives in five southeastern states and causing between $4 to 6 billion in property damage. The CAT V hurricane caused significant disruption at several major installations, including NS Guantanamo Bay, NSB King's Bay, NS Mayport, NAS Jacksonville, and others. Those servicemembers and their families who experienced property damage or evacuation may be eligible for payment from the U.S. Government.

Claims for Loss or Damage to Personal Property

You may file a claim IF:

- You are an active duty member (or reservist on active duty), or civilian Department of the Navy employee;
- You suffered loss or damage to your personal property due to Hurricane Matthew (up to $100,000);
  - Personal property includes, but is not limited to, household goods, unaccompanied baggage, pets, potted plants, privately owned vehicles, mobile homes, and boats.
  - The reimbursable amount is the depreciated fair market value of the good.
  - Damage from lightning, flooding, power surges and power failure may be cognizable, depending on the circumstance.

AND

- Your property was on base (e.g., government quarters or PPV housing).

Claims do not replace private insurance: If you have insurance (e.g., vehicle, homeowners, rental), you must seek payment from your insurance company first and submit a copy of that settlement with your final claim.

If you meet the above requirements and need immediate funds to replace items needed for daily living, you should submit the emergency partial payment package. In that package, the claim is estimated and you agree to provide full documentation (using the standard claim form, with supporting evidence) within three months of submitting the emergency partial payment package. After the claim is resolved, the government could seek repayment from you, if you were overpaid.

To file a claim:

- Pick up a claims packet from your local Region Legal Service Office Legal Assistance (RLSO) or Staff Judge Advocate's office.
- After you fill out the claim form, return the claim directly to the claims unit in Norfolk:
  - Mail: Personnel Claims Unit Norfolk, 9053 First Street Suite 102, Norfolk, VA, 23511-3605
  - Email: norfolkclaims@navy.mil
  - Fax: 757-440-6316 or 757-444-3337
  - Claims Help Line: 888-897-8217 or 757-440-6315

If your claim is successful, you will receive payment electronically through DFAS.

Evacuation Claims

The Joint Travel Regulations (JTR) provides evacuation entitlements to military members, civilian employees, and their families. In response to Hurricane Matthew, Commander, Navy Region Southeast (CNRSE) authorized evacuation entitlements for any AD military, drilling reservists, and civilian employees of the DON under mandatory evacuation orders issued by the civilian authorities. As such, all individuals who were part of the above-mentioned groups *who actually evacuated* may receive evacuation entitlements under the JTR.

Members ordered to evacuate their permanent duty station (PDS) may receive special allowances for (1) travel expenses, (2) lodging expenses, and (3) subsistence expenses. The CNRSE evacuation order created *safe havens*, or designated evacuation destinations. Each safe haven corresponded to a particular state or part of a state. The designated safe haven within the CNRSE evacuation order will serve as the basis for calculating the reimbursement amount. For example, an AD member stationed at NAS Jacksonville will be compensated travel to the safe haven of Tallahassee. To learn where your ordered safe haven was located, please contact your legal officer or local Staff Judge Advocate for a copy of the CNRSE order.

AD members who evacuated are treated as if they were in a TDY or PCS status; whereas, evacuated dependents fall under a separate chapter of the JTR. Practically, this means: (1) commands will cut TDY orders for AD personnel who have been ordered to evacuate by civilian authorities and (2) their family may still be reimbursed (unaccompanied dependents' reimbursement is governed by JTR Chapter 6) even if the active duty members does not evacuate.

SEE CLAIMS, PAGE 9

Divorce

determine whether and how to divide it. Consequently, because each state has varying laws on how property should be divided, the former spouse's share of the pension will be dependent on which state has the authority to address the retired pay issue.

Myth #1: "*My spouse automatically gets part of my retirement pay when we divorce*."

There are certain provisions in federal law creating automatic entitlements for former spouses. For example, if a spouse was married to a military member for at least 20 years, and 20 years of the marriage overlap with at least 20 years of the servicemember's active service creditable towards retirement, the former spouse is entitled to continuation of TRICARE health benefits. Perhaps this is the reason why many former spouses believe they are automatically entitled to a portion of the retired pay despite what a court order may or may not say. However, there is not one standard rule for dividing military pay, because there is no federal law granting former spouses a right to receive a certain portion of military retirement pay. What a former spouse will receive in a divorce depends on the laws of the state where the divorce takes place and the resulting court order

Myth #2: "*My spouse will not be entitled to any of my retirement pay if we were not married for 10 years of my military service*."

The "Ten Year" or "10/10" rule contained in the federal law addresses the *method* in which a former spouse receives his or her share of the retirement pay, but does not address *how much* of the retirement pay the spouse is entitled to receive

The "ten year rule" simply provides that if a couple was married for at least ten years during which the servicemember performed active creditable military service, the former spouse is authorized to receive his or her share of retirement pay – whatever that share may be – directly from DFAS. This is the case regardless of how much of the servicemember's retirement pay a court awards to the former spouse.

For example, if a couple was married for a total of twelve years and one spouse served in the military for eight of those twelve years of marriage, the other spouse would *not* be entitled to direct payment from DFAS. In that situation, the spouse would have to collect their share of the retired pay directly from the member. However, if one spouse served in the military for ten or more of those twelve years of marriage, the other spouse would be able to get his or her court-ordered share of the retirement pay directly from DFAS at the same time it is paid to the member.

Myth #3: "*My spouse is entitled to half of my retirement pay if we were married for at least 10 years of my military service*."

When dividing marital assets, many states use the starting point of 50% as a fair or "equitable" distribution to the parties. However, the 50% does not apply to the total value of the asset, but rather the amount that accumulated during the parties' marriage. To arrive at the 50% amount, many states apply a formula that divides the number of years that the marriage and military service overlapped with the total number of years of military service. For example, if a couple's marriage lasted exactly 14 years (168 months) during the member's military service and the member served for a total of 20 years (240 months), the former spouse will receive one half of the retirement pay resulting from the fourteen years during which they were married and the member was serving in the military. This equals 35% of the member's retirement pay, which is calculated with this formula: ½ x (168/240) = 35%

Other factors may impact the way military retirement pay is divided as well. These factors include: whether the servicemember is already retired or still serving at the time of divorce, whether he or she is receiving disability pay or VA disability benefits, and whether the court requires the member to maintain the Survivor Benefit Plan annuity for the former spouse.

Claims

Travel Expenses

Travel expenses and per diem will be paid in accordance with JTR. Keep in mind that where a POV was used, only the vehicle operator is eligible for reimbursement. Please consult you command administrative department if: (1) a dependent was geographically separated from the member and was in the process of rejoining the member at the PDS, (2) a household goods move was effected by the evacuation order, and (3) a dependent who could not travel alone due to age, physical or mental incapacity, or other extraordinary travelled with an escort.

Lodging and Subsistence Expenses

The maximum lodging expense allowed is the actual cost the member and their family incur, not to exceed the maximum locality per diem rate. The referenced locality is your ordered safe haven. **However, if the member traveled away from their PDS, but not to their ordered safe haven, they may still seek reimbursement.** Any costs not covered will be the responsibility of the member. The member may still receive full reimbursement if the location they evacuated to is later declared a safe haven. If an evacuated member stays with family or friends at no cost to themselves, they may not be reimbursed for lodging.

General Courts-Martial

August

♦ In Pensacola, FL, an E-4 pleaded guilty to wrongfully viewing and possessing child pornography. On 19 August 2016, a military judge awarded a dishonorable discharge, reduction to E -1, and confinement for 36 months. Per a pretrial agreement, confinement greater than 24 months will be suspended.

September

♦ In Pensacola, FL, an E-3 pleaded not guilty to sexual assault. On 16 September 2016, a military judge returned a guilty verdict and awarded a dishonorable discharge, reduction to E-1, and confinement for 18 months.

October

♦ In Mayport, FL, an E-6 pleaded not guilty to rape, aggravated assault with a loaded firearm, and patronizing a prostitute. On 11 October 2016, members returned a guilty verdict and awarded a reprimand, a dishonorable discharge, forfeiture of all pay and allowances, reduction to E-1, and confinement for 8 years.

♦ In Mayport, FL, an E-1 pleaded guilty to sexual assault and unauthorized absence. On 13 October 2016, a military judge awarded a dishonorable discharge, reduction to E-1, and confinement for 6 years. Per the pretrial agreement, confinement greater than 36 months will be suspended.

♦ In Pensacola, FL, an E-6 pleaded guilty to violating a lawful general order. On 17 October 2016, a military judge awarded reduction to E-5 and confinement for one month. The pretrial agreement had no effect on the sentence.

♦ In Pensacola, FL, an O-2 pleaded not guilty to sexual assault and false official statement. On 19 October 2016, a military judge returned a guilty verdict and dismissal and confinement for four years.

November

♦ In Pensacola, FL, an E-5 pleaded guilty to assault with an unloaded firearm and wrongfully enticing a civilian to engage in a sexual act. On 1 November 2016, a military judge awarded a bad conduct discharge, reduction to E-1, and confinement for 6 months. The pretrial agreement had no effect on the sentence.

♦ In Pensacola, FL, an O-1 pleaded guilty to wrongful possession of child pornography and wrongful distribution of child pornography. On 14 November 2016, a military judge awarded a dismissal and confinement for 3 years. The pretrial agreement had no effect on the sentence.

♦ In Pensacola, FL, an E-3 pleaded not guilty to sexual assault. On 16 November 2016, members returned a not guilty verdict.

♦ In Mayport, FL, an E-5 pleaded guilty to assault consummated by a battery. On 16 November 2016, a military judge awarded forfeiture of $800.00 per month for 6 months, reduction to E-1, and confinement for 179 days. The pretrial agreement had no effect on the sentence.

♦ In Mayport, FL, an E-5 pleaded guilty to attempting to disobey a superior commissioned officer, attempting to violate a State injunction, and communicating a threat. On 17 November 2016, a military judge awarded a bad conduct discharge, reduction to E-1, and confinement for 12 months. Per the pretrial agreement, confinement greater than time served will be suspended.

Special Courts-Martial

August

♦ In Mayport, FL, an E-4 pleaded guilty to wrongful use of marijuana, larceny, false official statement, and absence without leave. On 4 August 2016, a military judge awarded a bad conduct discharge, forfeiture of $900 pay-per-month for 11 months, reduction to E-1, and confinement for 11 months. The pretrial agreement had no effect on the sentence.

♦ In Mayport, FL, an E-4 pleaded guilty to assaults consummated by a battery. On 15 August 2016, a military judge awarded a bad conduct discharge, reduction to E-1, and confinement for 6 months. Per the pretrial agreement, the BCD and confinement greater than 30 days will be suspended.

September

♦ In Jacksonville, FL, an E-4 pleaded guilty to false official statement and larceny. On 19 September 2016, a military judge awarded a bad conduct discharge, reduction to E-1, and confinement for 6 months. The pretrial agreement had no effect on the sentence.

October

♦ In Pensacola, FL, an E-1 pleaded guilty to assault consummated by a battery and attempted assault consummated by a battery. On 4 October 2016, a military judge awarded forfeiture of $800 per month for three months, reduction to E-1, and 89 days confinement. Per the pretrial agreement, confinement greater than 60 days will be suspended.

♦ In Charleston, SC, an E-4 pleaded guilty to wrongfully using, distributing, and introducing a controlled substance onto an installation. On 17 October 2016, a military judge awarded a bad conduct discharge, reduction to E-1, and confinement for 8 months. The pretrial agreement had no effect on the sentence.

♦ In Charleston, SC, an E-4 pleaded guilty to wrongfully, using, distributing, and introducing a controlled substance onto an installation. On 17 October 2016, a military judge awarded a bad conduct discharge, reduction to E-1, and confinement for 6 months. The pretrial agreement had no effect on the sentence.

♦ In Pensacola, FL, an E-6 pleaded guilty to violations of a lawful order, false official statement, and assault consummated by a battery. On 27 October 2016, a military judge awarded a bad conduct discharge, reduction to E-1, and confinement for 6 months. The pretrial agreement had no effect on the sentence.

November

♦ In Mayport, FL, an E-6 pleaded not guilty to wrongfully and knowingly recording the private area of a person. On 1 November 2016, a military judge returned a guilty verdict and awarded a bad conduct discharge, reduction to E-1, and confinement for 60 days.

♦ In Mayport, FL, an E-6 pleaded guilty to violating a lawful general order. On 3 November 2016, a military judge awarded reduction to E-3, and confinement for 89 days. The pretrial agreement had no effect on the sentence.

♦ In Mayport, FL, an E-4 pleaded guilty to fraternization, false official statements, and larceny. On 16 November 2016, a military judge awarded a bad conduct discharge, reduction to E-1, and confinement for 9 months. The pretrial agreement had no effect on the sentence.

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Region Legal Service Office Southeast supports the operational readiness of Department of Navy assets in the Southeastern United States by providing responsive, timely and accurate legal guidance, support services and training in the areas of military justice and administrative law. RLSO SE headquarters is located onboard Naval Air Station Jacksonville, Florida and has detachments throughout the Region and Guantanamo Bay, Cuba. RLSO SE geographic area of responsibility includes the states of Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, Tennessee, Missouri, Oklahoma, Kansas, Arkansas, and Texas as well as Cuba, Puerto Rico, South America and portions of Mexico.

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Naval Air Station Corpus Christi	(361) 961-3568
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